Supreme Court, U.S.
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No. 87-1903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FITGER BREWING COMPANY,
a Minnesota corporation,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
REPLY TO RESPONDENT'S STATEMENT OF THE CASE	2
REPLY TO RESPONDENT'S LEGAL ARGUMENTS	4
CONCLUSION	6
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases:

Alevizos v. Metropolitan Airport Commission, 298 Minn. 471, 216 N.W.2d 651 (1974) 4
Danforth v. United States, 308 U.S. 271 (1939) 4
Fitger v. State, 416 N.W.2d 200 (Minn. App. 1987) .. 5
Orfield v. Housing & Redevelopment Authority of St. Paul, 305 Minn. 336, 232 N.W.2d 923 (1975) 5

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INTRODUCTION

The Petition in this case requests review of the Minnesota Court of Appeals' decision holding that no taking of the Fitger Brewing Company's ("Fitger") property occurred despite unchallenged jury findings that Fitger reasonably relied on State Highway Department representations that all plans for construction of the freeway required acquisition of all or a part of the brewery property, and that it would therefore be impractical for Fitger to install pollution abatement improvements in compliance with a State Pollu-

tion Control Agency directive that required such improvements for continued operation of the brewery; and that the State's conduct restricted Fitger in improving, developing, utilizing, or otherwise disposing of its property for over 13 years.

Although the Petition adequately states the reasons justifying the grant of a writ, we believe a brief reply is necessary to correct several assertions in Respondent's Brief in Opposition and to address Respondent's arguments in opposition to the Petition.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case attempts to revive factual disputes that were resolved by the jury, whose specific factual findings have gone unchallenged.[1] Despite all of Respondent's contentions, the jury found that prior to closing down on September 30, 1972, Fitger reasonably relied on Respondent's representations that all of its plans for construction of the freeway required the acquisition of all or a part of Fitger's property. The jury obviously rejected Respondent's contentions of the uncertainty of the plans and Respondent's eleventh hour disclaimer that there was a "possibility" that the freeway project would not go forward or that a new, as yet unthought of, alignment could be subsequently adopted.[2]

Petitioner is also confused by several apparent erroneous references to the record by Respondent. For example, on page 4 of its Brief in Opposition, Respondent cites Trial Court Exhibit 8 in support of the factual proposition that

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[1]The jury's Answers to the Trial Court's Special Interrogatories are set forth in Appendix 1 to this Reply Brief.

[2]Indeed, the mere *possibility* of a change in plans for or abandonment of a governmental project exists for virtually every such project.

Fitger did not have sufficient working capital to install pollution abatement equipment. However, that trial exhibit (Appendix 2 to this Reply Brief) was a letter from the Minnesota Pollution Control Agency ("PCA") to Fitger reminding it of the need for certain progress reports, and has absolutely nothing to do with Fitger's financial situation. On the same page of its Brief in Opposition, Respondent cites Trial Court Exhibit 24 as support for the proposition that Fitger "volunteered to either abate pollution or terminate operations on September 30, 1972." As a review of that trial exhibt (Appendix 3 to this Reply Brief) demonstrates, that exhibit is a letter from Respondent's Highway Department to the Executive Director of the PCA requesting favorable consideration to Fitger's request for additional time to comply with the PCA's pollution abatement requirements, and does not in any way support the proposition for which it is cited.

Respondent also asserts in footnote 4 on page 6 of its Brief in Opposition that claims relative to the rail access are being raised for the first time in the Petition. However, the following was asserted in Fitger's Amended Complaint:

> 15. That the rail access to Fitger's property was essential to Fitger's brewing operation such that the acquisition of the railroad access would effectively destroy Fitger's brewing business.
>
> 16. That the State of Minnesota has wrongfully omitted Fitger's property from its eminent domain proceedings for the condemnation of only the rail access to Fitger's property.

Amended Complaint, paragraphs 15 and 16 (Appendix G to Petition, at p. A-40). Respondent also contends that there

was no evidence at the trial concerning the taking of the rail access. On the contrary, the record demonstrates that Fitger President John Ferris testified about the brewery's use of the rail access and the impact of the taking of that rail access on the brewery. Trial Court Transcript, p. 350, ln. 13 to p. 353, ln. 7; p. 376, ln. 2 to p. 377, ln. 2. (Copies of these portions of the Transcript are attached as Appendix 4 to this Reply Brief).

REPLY TO RESPONDENT'S LEGAL ARGUMENTS

Respondent relies on the case of *Danforth v. United States,* 308 U.S. 271 (1939), for the proposition that mere planning of a public improvement by a governmental entity does not constitute a taking. However, as pointed out in the Petition, the issue raised by this case is what amount of conduct *beyond* mere planning gives rise to a taking under the Fifth Amendment. Moreover, in *Danforth,* the dispute was over the determination of the time of the taking in a condemnation action under the Flood Control Act for the purpose of computing interest on the condemnation award. The Court determined that the time of the taking in such a condemnation action was the date of the condemnation award. *Danforth's* applicability to an inverse condemnation case such as the case at bar is extremely tenuous, and thus, that case is of no determinative value in addressing the issues in this case.

Respondent attempts to defend the Minnesota Court of Appeals' decision in this case by contending that the Court of Appeals applied a constitutionally legitimate standard first expressed in the Minnesota Supreme Court case of *Alevizos v. Metropolitan Airport Commission,* 298 Minn. 471, 216 N.W.2d 651 (1974). A careful review of the

Minnesota Court of Appeals' opinion, *Fitger v. State*, 416 N.W.2d 200 (Minn. App. 1987) (Petition, Appendix A), reveals that the Court of Appeals' only expression of the *Alevizos* standard was its quotation in the beginning of the opinion's analysis. 416 N.W.2d at 205 (Petition Appendix A, at A-12). Mere lip service to a purported constitutional standard, however, does not qualify as an application of the standard.

The standard actually applied by the Minnesota Court of Appeals was, as noted in the Petition, attributed to the case of *Orfield v. Housing & Redevelopment Authority of St. Paul*, 305 Minn. 336, 232 N.W.2d 923 (1975),[3] as follows:

> Thus, under *Orfield*, the question is whether the State has abused its power of eminent domain.

416 N.W.2d at 207-208 (Petition Appendix A at A-18).

Respondent lists several considerations that must be examined by a court in a case such as this. Respondent's Brief at 12-13. None of those considerations were addressed by the Minnesota Court of Appeals. For example, one such consideration is the uniqueness of the burden placed on the individual landowner as opposed to the burden suffered by the public at large. The Court of Appeals failed to consider that no other property owner in the same vicinity of the planned freeway alignment was subject to a forced closure of its operations by the PCA in the absence of pollution abatement, nor dependent on the railway access that would be severed by the freeway for the continued opera-

[3]It is particularly noteworthy that in *Orfield*, the Minnesota Supreme Court expressly concluded that *Alevizos* was inapplicable to *Orfield's* facts. 305 Minn. at 340, 232 N.W.2d at 926.

tions of the highest and best use of its property, as Fitger was.

In light of the foregoing, Petitioner submits that Respondent's basis for upholding the Minnesota Court of Appeals' decision is completely unfounded and without merit.

CONCLUSION

For the foregoing reasons, as well as those that have been urged in the Petition, certiorari should be granted. Without intending to diminish the need for plenary review of this case, Petitioner alternatively suggests that in light of the Minnesota Court of Appeals' clear failure to apply the Fifth Amendment standards established by this Court, summary reversal is in order, or, in the alternative, a grant of the Petition, vacation of the Minnesota Court of Appeals' decision, and a remand for proper consideration in light of this Court's precedents.

Respectfully submitted,

/s/ Richard J. Leighton*
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APPENDIX

APPENDIX INDEX

Appendix 1 — Jury's Answers to Special Interrogatories A-1
Appendix 2 — Trial Court Exhibit No. 8 ..... A-5
Appendix 3 — Trial Court Exhibit No. 24 ..... A-7
Appendix 4 — Trial Court Transcript pp. 350-353; 376-377 ..... A-9

APPENDIX 1

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota,
Defendant.

SPECIAL INTERROGATORIES
File No. 1423999

1. Prior to closing down on September 30, 1972, did the Fitger Brewing Company reasonably rely on the representations of the State, through its Highway Department and its employees, that all of the plans for the construction of Interstate 35 required the acquisition of all or a part of Fitger's property? Yes.

2. Before September 30, 1972, was Fitger's business adversely affected as a result of public announcements and other publicity, generated by the State that the route for Interstate 35 would require the taking of Fitger's property? Yes.

3. Did Fitger's reasonably rely on the State's representation that it would be impractical for Fitger's to install pollution abatement facilities because all of the State's I-35 plans would require the acquisition of some or all of Fitger's property? Yes.

4. Prior to closure on September 30, 1972, did the State misrepresent to Fitger Brewing Company that Federal Regulations governing the State did not permit it to "make an acquisition or indeed begin the process until the final alignment of the highway was determined? Yes.

If your answer to question 4 is "yes", then answer question 5.

5. Did the Fitger Brewing Company reasonably rely on that misrepresentation in its corporate planning? Yes.

6. Did the State by its acts or conduct restrict Fitger Brewing Company in improving, developing, utilizing, or otherwise disposing of its property between the date of its public announcement in November 1970 and December 1983, when the property was sold? Yes.

7. What was the fair market value of the Fitger Brewing Company brewery property on September 30, 1972?

$1,250,000.00.

8. What amount will reasonably compensate the Fitger Brewing Company for all of the necessary expenses it incurred to maintain its property from September 30, 1972 until the property was sold on December 19, 1983?

$812,797.

Foreperson

Jurors concurring sign here.

1. Christine A. Spehar
2. Janice Krueger
3. Pamela A. Miller
4. Nancy Poferl
5. George Davis, Jr.

Jurors Concurring

Dated at Duluth, Minnesota, this 19th day of November A.D., 1986.

This verdict was agreed to at the hour of 4 o'clock P.M.

After six hours of deliberation five jurors may agree upon and return a verdict. When the verdict is agreed to by five jurors only (after six hours deliberation) all the jurors who agree to the verdict should sign the same and the time of agreement should be noted.

APPENDIX 2

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY
717 Delaware Street S.E.
(Oak and Delaware Streets S.E.)
Minneapolis, Minnesota
55440
September 5, 1969

Mr. John C. Beerhalter, President
Fitger Brewing Company
600 East Superior Street
Duluth, Minnesota 55802

Dear Mr. Beerhalter:

This is to remind you that Interstate Water Quality Standards (WPC-15) requires the regular submission of quarterly reports on progress toward construction of necessary improvements to waste disposal facilities discharging to interstate waters, and monthly reports on the operation and effluent quality. Our records indicate these reports have not been provided.

A review of our file indicates you are seriously delinquent in meeting the recommended schedule for construction of industrial waste treatment facilities or diversion of wastes to the municipal sanitary sewer system.

You should be aware that this office intends to use all available resources to obtain compliance with State pollution control laws and regulations.

If you wish arrangements can be made for a meeting in this office at a mutually convenient time to attempt to resolve any existing problems which may be preventing sub-

mission of quarterly and monthly reports and/or impeding progress toward construction of adequate waste disposal facilities.

It is expected that quarterly progress reports on the status of this project and monthly operation reports will be summitted promptly and regularly or that you will make necessary arrangements to meet with our staff within thirty days.

Yours very truly,

/s/ R. D. Miller, Acting Chief
Section of Enforcement

RDM/RWK:ms

cc: Honorable Ben Boo, Mayor
City Council of Duluth, c/o Mr. A. Howard Wold, Clerk.

Trial Court Exhibit No. 8

APPENDIX 3

STATE OF MINNESOTA
Department of Highways
St. Paul, Minn. 55101

July 7, 1971

cc:
R. Lappegaard
L. H. Miller
J. A. Ferris

Grant Merritt
Executive Director
Minnesota Polution Control Agency
717 Delaware Street S.E.
Minneapolis, Minnesota 55440

Dear Mr. Merritt:

Under date of July 6, 1971, Mr. J. A. Ferris, President, Fitger Brewing Company, Duluth, wrote you concerning problems his firm has which are aggravated by pending decisions concerned with the location of Federal Interstate Route 35 in Duluth.

Commissioner of Highways Ray Lappegaard is at this time processing a contract with the firm Eckbo, Dean, Austin and Williams to study and make recommendations for solutions to this highway location problem. This study should require 32 weeks for completion. This study which has the cooperation of the City of Duluth and environmental groups in Duluth will consider all aspects of transportation corridors from the evaluation of existing data, community involvement through environmental considerations.

It is during this 32 weeks that Fitgers future at its present location is uncertain.

For these reasons, we would ask favorable consideration to its request for an extension of time.

Sincerely,

/s/ C. E. Burrill

Assistant Commissioner —

Transportation & Transit

Planning & Programming

CEB:KII

Trial Court Exhibit No. 24

APPENDIX 4

November 3, 86 Ferris

* * * *

[350] Q. Operating, pardon me. Operating expense went down? Now, in 1969 then, and the subsequent three years, including 1969, that includes the three years? In any event, that time that you were with the brewery, how did you take deliveries physically of your materials and supplies? A. The grain haul came over the railroad tracks that led into the back of the brewery. That has since been cut off.

Q. The grain came in — A. By railroad.

Q. How was that unloaded? A. We had — they came on hopper cars. We had a fitting we put on the bottom of the hopper and it was sucked up by vacuum to the fifth floor and then fed down by gravity.

[351] Q. How many shipments of grain would you require in a year to produce the 25 and less thousand barrels per year? Do you remember that? A. Eight or nine.

Q. Per year? A. Yes.

Q. Was that at the peak? A. I am just talking about bushels of malt. There was also corn grits. There were separate bins for those. So, it would probably figure — I don't know what the ratio was additional for corn.

Q. Okay. Are you saying then in fiscal year 1969 that there had been eight separate train movements moving grain cars in and out of the brewery area? A. Yes, they switched them on brewery property and come in with several car loads for different destinations — switch them and put them in and they had to come in at night because of the cars parked on Michigan Street.

Q. By that you mean that they were blocking the tracks — these cars? A. Yes.

Q. And what else was delivered by train besides the grain? A. Bottles on occasion. We had — periodically you would have to replace bottles that were lost or not returned to the brewery. Most of our cases came in by truck. [352] Q. What do you mean by that? A. Cases for putting the bottles — or the cans.

Q. So those were cardboard or paper, I take it?

A. Yes.

Q. How about the bottle caps and labels? A. That came in by — those came in by trucks or vehicles. They weren't nearly as bulky and might be just a quarter of a truck load in some cases.

Q. And how about the bottles? Did they sometimes come by truck as well? A. They were delivered back to the plant by truck but when we replaced bottles that had been broken or not returned they came by train as a rule, or box car.

Q. When you say as a rule, I take it occassionally you did purchase bottles and they were brought in? A. Simply, yes.

Q. Okay. And what railroad line was that again?

A. That was — used to be the tracks down there in Northern Pacific but that is Burlington Northern now.

Q. So, was it Burlington or was that the railroad that you dealt with and did business with? A. Part of the time. I don't know when the merger took place but it didn't make any difference in our operation.

Q. Right, but whatever the railroad was called, it was always the same railroad except —

[353] A. Same tracks.

Q. Over a period of time there were several — three railroads that merged, I believe, and formed the present Burlington Northern? A. That's right.

Q. So, that's the railroad that we're talking about?

A. Yes.

* * * *

[376] Q. I'm going to ask you that question one more time. There were two plans considered by the advisory committee? A. Yes.

Q. Were they designated by letter? A. Yes.

Q. What were those letters? A. Plan D and Plan E.

Q. One of those plans would have affected the Fitgers Brewery, would it not? A. Yes.

Q. And the other plan would not have affected the Fitger's brewery? Is that correct? A. No.

Q. By no you mean it would not have affected — A. No, it would affect the Fitgers Brewing Company, both plans.

Q. How would Plan E have affected the Fitgers brewery? A. Plan E which is the existing construction now, would have cut off our railroad access as it did.

Q. Would it have taken any of the buildings?

A. No, it wouldn't have touched our land but it would have cut off the railroad servicing the plant.

Q. It would not have touched the buildings or land at all? A. No, but it would have affected the plant.

[377] Q. That's the way the highway is being built today? A. Yes.

* * * *